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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: SHABA Contracting

File: B-287474

Date: July 2, 2001

Hadley H. Gross for the protester.
Lynn W. Flanagan, Esq., Department of Agriculture, for the agency.
Charles W. Morrow, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Forest Service reasonably determined that it was not required to incorporate the clauses in Federal Acquisition Regulation § 52.228-5, Insurance—Work on a Government Installation, and Agriculture Acquisition Regulation § 452.228-71, Insurance Coverage, which obligate the contractor to obtain specified coverages of workers' compensation and other insurance, in a solicitation for work on forest lands in a national forest where the Forest Service reasonably concluded that the work was not being performed on a "Government installation," which is the situation where these clauses are required to be incorporated.

DECISION

SHABA Contracting protests invitation for bids (IFB) No. FS-WOC-01-1029, issued by the United States Department of Agriculture, Forest Service, Russellville, Arkansas, for forestry work.

We deny the protest.

The IFB was issued to procure pine site preparation, hardwood site preparation, timber stand improvement, and wildlife stand improvement on National Forest lands in the Buffalo Ranger District, Arkansas under a fixed-price requirements contract. The schedule contained estimated quantities of acres for the four items of services.

SHABA first timely protests that the IFB should have included the Federal Acquisition Regulation (FAR) clause requiring the contractor to have insurance for workers' compensation and liability on government installations.

FAR § 28.301(b) provides that "[c]ontractors . . . are required by law and this regulation to provide insurance for certain types of perils (e.g., workers' compensation) [and] . . . when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government." We have found that the foregoing section does not itself impose a requirement that contractors be required to carry workers' compensation insurance, although we noted that certain state laws and other FAR sections require contractors to obtain various types of insurance in certain situations. See Renewable Forestry Servs., Inc., B-235627, Sept. 20, 1989, 89-2 CPD ¶ 253 at 2-3.

FAR § 28.310(a) states (with certain exceptions not applicable here):

> The contracting officer shall insert the clause at [FAR §] 52.228-5, Insurance--Work on a Government Installation, in solicitations and contracts when a fixed-price contract is contemplated, the contract amount is expected to exceed the simplified acquisition threshold, and the contract will require work on a Government installation.

FAR § 52.228-5 requires the contractor to provide the insurance elsewhere identified in the contract. FAR § 28.307 specifies the minimum insurance types and coverages where the FAR § 52.228-5 clause is required to be included in a solicitation. FAR § 28.306(b). Consistent with FAR § 28.307, Agriculture Acquisition Regulation (AGAR) § 428-310 (2000) requires the contracting officer to include the clause at AGAR § 452.228-71, Insurance Coverage, in all solicitations that contain FAR § 52.228-5. AGAR § 452.228-71 requires specified coverages of workers' compensation and employers liability, general liability, automobile liability, and aircraft public and passenger liability insurance.

The Forest Service argues that the clauses at FAR § 52.228-5 and AGAR § 452.228-71 were not included in this solicitation because the agency does not consider work performed on forest lands within a national forest to be performed on a "Government installation." Agency Legal Memorandum at 5. There is no definition of "Government installation" in the FAR, and we are unaware of any law or regulation that requires the Forest Service to include all publicly-owned lands, such as national forest lands managed by the Forest Service, in the definition, nor has the protester cited such a law or regulation. It would seem that the federal government ownership of certain lands does not necessarily make them a "Government installation"; otherwise, the regulation would seemingly say "Government-owned property."[1] Under the circumstances, we cannot conclude that the Forest Service's judgment that national forest lands are not government installations is unreasonable.

(continued...)

While SHABA complains that the Forest Service has included clauses requiring workers' compensation and other insurance in other solicitations for similar work and asserts that this clause serves the best interest of the government in this case, FAR subpart 28.3 gives contracting officers the discretion to include FAR § 52.228-7 and AGAR § 452.228-71 in solicitations, even if they are not being performed on a government installation. It is apparent that while these clauses are intended to protect the government and others, providing the insurance specified in those clauses has a cost. SHABA has not shown that the agency has abused its discretion in not including the clauses in this case.[2]

SHABA protests that the site viewing was inadequate because an insufficient number of acres were available during the site viewing. The Forest Service explains that the purpose of the site viewing was simply to demonstrate to potential bidders the types of services that would be required under the contract, not to identify the precise acres to undergo the services. Thus, the Forest Service reports that the agency's site viewing identified acreage that had undergone timber stand improvement, wildlife stand improvement, commercial thinning, and an area that was to receive hardwood site preparation. In addition, the agency advises that it pointed out varying conditions of slash, standing trees, and terrain, answered questions and provided technical information regarding species selection, estimating residual basal area, and stump removal. See Agency Memorandum of Law at 7. The Forest Service reports that it was unable to identify the precise areas in need of these services, and this is the reason the agency utilized a requirements contract to obtain the services. SHABA does not specify what additional information it needed, except to state that the "areas to be worked were not reasonably obtainable." Protester's Comments. Under the circumstances, we find no merit to SHABA's complaint about the adequacy of the site viewing.

(...continued)

[1] For example, the Department of Defense has defined "Government installation" as a "United States Government facility having fixed boundaries and owned or controlled by the government." 32 C.F.R. § 842.74 (2000). It would seem that forest land within a national forest would not ordinarily be characterized as a "facility" (although perhaps a building or set of buildings located in a national forest could be considered a facility).

[2] SHABA also protested that the agency included an incorrect wage determination in the solicitation. Following the protest, the agency obtained the correct wage determination and this was incorporated into the IFB by amendment 1. This protest ground has therefore been rendered academic and will not be considered further.

Finally, SHABA complains that the Forest Service will make award to a firm at a very low price, and that firm will circumvent workers' compensation and other employment statutes and will employ nonimmigrant aliens. SHABA complains that the Department of Labor is not enforcing applicable labor regulations and the Forest Service is taking advantage of this situation to obtain low-priced contractors. These issues are not for our consideration, even if they were not premature and speculative. A protester's claim that a bidder or offeror submitted an unreasonably low price--or even that the price is below the cost of performance--is not a valid basis for protest. An offeror, in its business judgment, properly may decide to submit a price that is extremely low. Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶124 at 4. An agency decision that the contractor can perform the contract at the offered price is an affirmative determination of responsibility, which we will not review absent a showing of possible bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may not have been met. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2001). Moreover, an allegation that a contractor will engage in illegal practices after award of the contract is a question of contract administration, which is the responsibility of the procuring agency and other cognizant federal agencies, such as the Department of Labor, and which cannot be reviewed by our Office under our bid protest function. Bid Protest Regulations, 4 C.F.R. § 21.5(a)(2); see The Galveston Aviation Weather Partnership, B-252014.2, May 5, 1993, 93-1 CPD ¶ 370 at 2.

The protest is denied.

Anthony H. Gamboa
General Counsel